91-364

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Case No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL E. ARNOLD,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether a machinist employed by an interstate rail carrier and who is injured while performing the function of repairing the brakes of a locomotive engine situated within the confines of a dock facility, but a significant distance from the water's edge, is limited to recovery under the Longshoreman and Harbor Workers' Compensation Act or whether he may maintain an action for personal injury pursuant to the Federal Employers Liability Act.

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OPINIONS BELOW

The opinion of the district court, dated September 7, 1990, is not officially reported, and appears as Appendix A to this Petition.

The opinion of the Court of Appeals, dated June 6, 1991, is not officially reported and appears as Appendix B to this Petition.

STATEMENT OF JURISDICTION

The Petitioner, Paul E. Arnold, respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Sixth Circuit entered on June 6, 1991.

This action was commenced with the filing of a complaint for personal injuries pursuant to the provisions of the Federal Employers Liability Act (FELA), 45 U.S.C. Sec. 51 *et seq.* and specifically Section 56 thereof, establishing jurisdiction in the United States district courts for actions brought under the FELA.

Plaintiff appealed to the United States Court of Appeals for the Sixth Circuit from a judgment of the United States District Court for the Northern District of Ohio dismissing the complaint, with prejudice, for lack of subject matter jurisdiction.

On June 6, 1991, the Sixth Circuit Court of Appeals, in a brief per cuiram decision, affirmed the judgment of the District Court.

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

45 U.S.C. Section 51:

> Liability of common carriers by railroad, in interstate or foreign commerce, for injuries to employees from negligence; definition of employees.
>
> Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States or Territories, or between the District of Columbia or any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in the case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of

kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees or such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.

Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this Act and an Act entitled "An Act relating to the liability of common carriers by railroad to thier employees in certain cases" (approved April 22, 1908) (45 USCS Statute 51 et seq.) as the same has been or may hereafter be amended.

33 U.S.C. Section 902(3):

. . . the term 'employee' means any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations, and any harbor worker including the ship repairman, shipbuilder and shipbreaker . . .

33 U.S.C. Section 903(a):

. . . except as otherwise provided in this section, compensation shall be payable under this act in respect of disability or death of any employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel).

STATEMENT OF THE CASE

This is an action brought under the Federal Employers' Liability Act (PELA) for personal injuries sustained by the Plaintiff, Paul E. Arnold, on April 21, 1988. On that date, Plaintiff was employed by Defendant, Consolidated Rail Corporation, as a mechanic/machinist and had been so employed since approximately March 31, 1970. At his deposition, Plaintiff testified that he normally worked out of the Defendant's Stanley Yard (a railroad facility located in the vicinity of Toledo, Ohio), reporting every day at the fuel pad. For the summer season of 1988, he was the sole regularly scheduled Conrail mechanic assigned to the Presque Isle/Lakefront Dock facility. Prior to the 1988 season, he never worked at Presque Isle on a regular basis, but occasionally was sent there to service a particular train.

Mr. Arnold's basic job duties as a mechanic for Conrail at the dock facility were described as follows:

> A. Checking out the locomotives, going from the cab of the engine, 20 engine, checking out, make sure the engine's working proper, make sure there's no leakage for the air when the unit is tied onto the train, taking a leakage test, get down, make sure all sanders are working.
>
> Q. What are sanders?
>
> A. That is sand that goes on every wheel on the track.
>
> Q. Okay. Go ahead. I know what you mean.
>
> A. Check out the sanders, make sure they're all working. Check out all brake rigging, all the brake shoes, the brake travel, checking out traction motors. Just visual looking to see if we could see anything wrong and making repairs for anything we find wrong. It's mechanical.
>
> Q. So not only have to check out the locomotive, if you find something wrong it's your duty to repair it.
>
> A. Yes, sir.

(Deposition of Paul Arnold at 87).

On the morning of his injury, Mr. Arnold proceeded to inspect TORCO Engine No. 7800 in the same manner as he had inspected ten other railroad engines that same morning. This locomotive power unit was a full size engine similar to those operated by both Conrail and Chessie System both within the Lakefront Dock facility and over the road. Plaintiff checked the air equipment, automatic brake, independent brake, deadman pedal, cab sink shell, windshield wipers, the boiler, governor, headlights and brakes. When he examined the brake on wheel number three, he found the brake shoe to be defective. It was while attempting to replace this brake shoe on Engine No. 7800, which Plaintiff referred to as being so badly in need of repair as to constitute a "federal defect," that Plaintiff sustained the herniated lumbar disc for which suit under the FELA was instituted.

In addition to the Plaintiff's deposition, the facutal record before the district court consisted of the Affidavit of James A. Arton, Assistant Manager of the dock facility, which was filed by Defendant in support of its Motion to Dismiss; the deposition of Mr. Arton taken by Plaintiff; and the Affidavit of Terry D. Lewis, a private investigator and photographer retained by Plaintiff. At his deposition, Mr. Arton testified that he had no independent recollection of Plaintiff's injury, having learned of it only through a Conrail claims agent. Arton understood, and it is not disputed, that the injury occurred at a location with which he was familiar and which he approximated to be at least 2000 yards from the water. Further, Arton admitted that the activity of changing brake shoes on a locomotive (power unit engine) was a traditional railroad activity.

During the course of this deposition, Mr. Arton was shown photographs of several types of locomotives found at the docks. All of these photographs had been taken by Terry D. Lewis, Plaintiff's photographer. Exhibits 2 and 3 of the Arton deposition depicted the TORCO unit upon which Plaintiff was injured. Exhibit 4 depicted a CSX road locomotive similar in size and functions as Locomotive No. 7800 and

which was found within the Lakefront Dock facility. Exhibit 5 depicted a much smaller "pusher unit" used to index cars into a dumper. Pusher units are much smaller both in regard to size and power from the TORCO unit being serviced by Plaintiff when he was injured.

According to Aton, all of the activity relative to the operation of the small pusher unit took place in close proximity to the water. Further, the servicing and repair of these pusher units was done by members of the Longshoreman's Association, a different labor union from which Plaintiff was a member. When asked who would repair the TORCO unit, the response was "locomotive mechanic." Thus, while it was theoretically possible for a longshoreman to repair a larger TORCO unit located 2000 yards (or more) from the water, it would be a violation of the longshoreman union contract to do so. In other words, as a practical matter, a longshoreman could *not* have done the repair work on TORCO 7800 which was being performed by the Plaintiff. Further, Arton testified that the TORCO unit being repaired by Plaintiff was located in an area customarily used for the repair of railroad equipment. This area and sidetrack was located approximately *two miles from the water,* was on a *sidetrack situated four tracks south of any rail movement and was not being used for the loading or unloading of coal.*

In paragraph 3 of the affidavit of James Arton, which was filed by Defendant in support of its motion to dismiss, Arton stated generically that the work being done by Plaintiff was "an integral part of the loading and unloading process." However, when he was cross examined and asked to elaborate on this statement at deposition, Mr. Arton *recanted* his prior Affidavit averment and testified as follows:

> Q: What I am getting at, the fact that this locomotive, this TORCO 78 [sic] was down for repair did not shut down the loading and unloading process at the dock, did it?
>
> A: No.

Q: I want to assume that, in fact, on the day of this injury there was a problem with the brake shoe and because of that Mr. Arnold believed that it may have created a federal defect. You know that that means, don't you?

A: Yes, I do.

Q: Okay. What does that mean?

Mr. Timonere: Talking about the federal defect now?

Mr. McGill: Yes.

A: It means that the problem with the locomotive would have made the locomotive illegally used under the Federal Railway Administration Act until the problem was corrected.

Q: Now, once that situation occurs that power unit has to be repaired, correct?

A: In the case of brake shoes that needs to be anticipated, and the brake shoes could be replaced at a time of convenience to the railroad rather than wait until was not suitable for service.

Q: Are you telling me that on this day this brake shoe was being repaired at a time convenient to the railroad?

A: I don't recall on that particular day, but that would be the normal procedure.

Q: And when you say "at a time convenient to the railroad," what are you talking about?

A: It would be at a time when there is no ore to load into cars and machinery is idle and the locomotive is available for such maintenance work.

Q: In other words, the loading and unloading process at the dock would not be materially affected by the power unit being out of service?

A: That would be good management.

Q: That would be a true statement also, wouldn't it?

A: Yes.

Based upon all of the foregoing, Plaintiff contended that the District Court had subject matter jurisdiction over his claim for personal injuries under the FELA and that Defendant's proposition that recovery could only be had under the Longshoreman and Harborworker's Act should have been rejected. The trial court held, however, that it lacked jurisdiction and dismissed the complaint. The Sixth Circuit Court of Appeals affirmed this determination.

ARGUMENT IN SUPPORT OF PETITION FOR CERTIORARI

A. Introduction

The issue posed by the Railroad's motion to dismiss for lack of subject matter jurisdiction and upon this appeal is whether the Plaintiff's injuries are covered by the Federal Employers' Liability Act (FELA), 45 U.S.C. Sec. 51 *et seq.*, as alleged in the complaint, or whether his exclusive remedy is under the Longshoreman and Harborworker's Compensation Act. (LHWCA), 33 U.S.C. Sec. 901 *et seq.*, as argued by Conrail.

The FELA was enacted approximately 80 years ago in order "to put on the railroad industry some of the cost for legs, eyes, arms and lives which it consumes in its operations." *Wilkerson* v. *McCarthy*, 366 U.S. 53, 66 (1949). It has been consistently held that the FELA is remedial in nature and is to be liberally construed to effect its humanitarian purposes. *See, e.g., Green* v. *River T.R. Co.*, 763 F.2d 805 (6th Cir. 1985); *Bocook* v. *Louisville & N.R. Co.*, 67 F.Supp. 154 (D.Ky. 1946). *Accord Rodriguez* v. *Delray Connecting Railroad*, 473 F.2d 819 (6th Cir. 1973).

Historically, the LHWCA covered only employees injured upon navigable waters. *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969). In response to that decision, the Act was amended in 1972 to provide a two pronged test for coverage, situs and status. The situs requirement is set forth in 33 U.S.C. Sec. 903(a):

> . . . except as otherwise provided in this section, compensation shall be payable under this act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, drydock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling or building a vessel).

Section 902(3) of the Act defines the status requirement:

> . . . the term 'employee' means any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations, and any harbor worker including the ship repairman, shipbuilding and shipbreaker . . .

Both the trial court and, inferentially, the Court of Appeals in the case *sub judice* found this Court's holding in *Chesapeake & Ohio Ry. Co.* v. *Schwalb*, ____ U.S. ____, 110 S.Ct. 381 (1989), to be controlling. Appellant submits, however, that the decisions below go far beyond the "consciously narrow holding" of the *Schwalb* decision. *See Merrill* v. *Chicago & Illinois Midland Ry. Co.*, 715 F.Supp. 770 (C.D. Ill. 1990). Railroad employees such as Paul Arnold, who are the subjects of Congressional protection by virtue of the passage of the FELA, should not be relegated to a lesser degree of damages under the LHWCA based upon his varied work assignments within a given day and the shifting and uncertain vagaries of "situs" and "status." Railroad workers should have the right to expect the protection and benefits of the FELA, an act of Congress which has protected them since its enactment in 1906. Preventing the application of the FELA to the case at bar would only serve to extend Congress' imaginary boundary line of the LHWCA to an unreasonable and unprecedented point which is devoid of logic or practical function.

The instant case affords this court the unique opportunity to define and/or refine the status and situs requirements of the LHWCA. The decisions below mandate that recovery for any injury to an interstate railroad employee will be limited to LHWCA if it occurs anywhere within the vast and undefined ares contained within a dock facility and regardless of the nexus between the work being performed at the time of the injury and longshoring activities.

B. The Injuries Sustained by Petitioner Occurred Outside of the Parameters of the Situs Test Enunciated in 33 U.S.C. Sec. 903(a).

While it is true that Congress intended, within a limited respect, to provide LHWCA coverage to landbased employees, it does not follow that it intended that every inch of area within the geographical limits of a dock or port facility be considered "adjoining" as used in Sec. 903(a). As noted by this Court in *Director, Office of Workers' Compensation Programs* v. *Perini*, 459 U.S. 297, 317 (1983), the legislative history of the 1972 amendments to the LHWCA reveals that Congress did not "intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity."

The issue of situs was not before this Court in *Schwalb*, *supra*. However, in the post-*Schwalb* case of *Merrill* v. *Chicago & Illinois Midland Ry. Co*, *supra*, it was observed that situs under Section 903(a) "is tied directly to whether the location [of this accident] is 'customarily used . . . in loading . . . a vessel.' " 751 F.Supp. at 771. Put differently, "is the situs used as part of loading or unloading operations?" *Id.*

In the case *sub judice* the accident occurred on a remote *sidetrack* located approximately 2000 yards from the water, where the loading and unloading process could not be affected by these repair efforts. As Judge Mills observed in *Merrill*, "there is a line somewhere . . . where the situs test would no longer be met, and where no maritime jurisdiction would be present." 751 F.Supp. at 778. Only this Court can draw that line. It is inconceivable and illogical that Congress could have intended the LHWCA to apply to an injury occurring where and under the circumstances found here.

This Court should, therefore, accept this case so as to define the outer limits of situs under 33 U.S.C. Sec. 903(a). This Court should also accept this case to determine whether tracks running into, out of and through a dock facility con-

stitutes a "marine railway" as that phrase is used in Sec. 903(a). Both of the lower courts in this case concluded that Paul Arnold was injured on a marine railway. Appellant submits that this is patently incorrect. Case law has defined a "marine railway" in much different terms. Thus, in *O'Leary* v. *Puget Sound Bridge and Dry Dock Co.*, 349 F.2d 571, 573 (9th Cir. 1965), the Court construed the words "marine railway," as defined by the United States Department of the Navy, as follows:

> A marine railway is a permanently fixed track system extending from a point on shore well above the waterline to a point offshore well below the waterline; it is equipped with a cradle capable of moving along the track by means of rollers or wheels, and a cable or chain and hauling mechanism for hauling the cradle carrying the docked ship into or out of the water. A vertical lift is a variation of a marine railway that is used for small craft; it consists of a cradle and lifting device for raising the craft vertically out of the water.

See also, St. Louis Shipbuilding Co. v. *Director of Office of Workers' Compensation Programs*, 551 F.2d 1119 (8th Cir. 1977) (applying 1972 amendments). Patently, the Plaintiff in the instant case was *not* injured on a marine railway as defined by the Ninth and Eighth Circuit Courts of Appeal, and the courts below erred in concluding otherwise.

C. Petitioner is not an "Employee" within the Meaning of 33 U.S.C. Sec. 902(3).

The focus of the status test set forth in 33 U.S.C. Sec. 902(3) is occupational. As this court stated in *Schwalb*, *supra*: "[L]andbased activity occurring within the Section 903 situs will be deemed maritime only if it is an essential part of loading or unloading a vessel." 110 S.Ct. at 384. Thus, "employees who are injured while maintaining or repairing equipment essential to the loading or unloading process are covered by the Act." *Id.* at 385.

The question which it is respectfully requested this Court must address is what is "essential equipment?" Is one of ten locomotives available to haul coal cars so essential to the loading and unloading process that an injury sustained while repairing its brakes relegates the railroad employee to harbor workers' benefits as opposed to tort recovery under the FELA? In *Schwalb*, this Court indicated that "[t]he determinative consideration is that the ship loading process could not continue unless the retarder . . . was operating properly." 110 S.Ct. at 836. There was also evidence that conveyor belts would "eventually" become clogged if not periodically cleaned. *Id.*

However, in the case at hand, there is not *one scintilla* of evidence that the loading or unloading process would in any way be impeded by the temporary removal from service of this one locomotive upon which plaintiff was working when he sustained his injury. To the contrary, the testimony of James Arton, the Assistant Manager of the dock facility, points totally in the other direction:

> Q: Are you telling me that on this day this brake shoe was being repaired at a time convenient to the railroad?
>
> A: I don't recall on that particular day, but that would be the normal procedure.
>
> Q: And when you say "at a time convenient to the railroad," what are you talking about?

A: It would be at a time when there is no ore to load into cars and machinery is idle and the locomotive is available for such maintenance work.

Q: In other words, *the loading and unloading process at the dock would not be materially affected by that power unit being out of service?*

A: That would be good management.

Q: That would be a true statement also, wouldn't it?

A: *Yes.*

(Deposition of James Arton at 34-35).

It was, therefore, totally uncontradicted on the record below that Mr. Arnold's mechanical activities *vis a vis* the defective locomotive was *not* essential to the loading or unloading process. Further, just as the rerailment in *Merrill* was not longshoring but rather railroad activity, 751 F.Supp. at 779, the act of repairing a broken and defective brake shoe in the instant case must be considered a railroad activity.

Given the "consciously narrow holding" of this Court in *Schwalb, see Merrill, supra,* at 778, it is repsectfully submitted that *Schwalb* must be confined to its facts. Railroad employees such as Paul Arnold, who are the subjects of Congressional protection by virtue of the passage of the FELA should not be relegated to a lesser degree of damages under the LHWCA based upon the shifting and uncertain vagaries of situs and status. Railroad workers should have the right to expect the protection and benefits of the FELA, an act of Congress which has protected them since its enactment in 1906. Preventing the application of the FELA to the case at bar would only serve to extend Congress' imaginary boundary line of the LHWCA to an unreasonable and unprecedented point which is devoid of logic or practical function.

While there may be an occasional case where the Longshore and Harbor Worker's Compensation Act will prevail over the Federal Employer Liability Act, these cases

should be the strictly limited exception rather than rule. Paul Arnold was a Railroad employee performing traditional Railroad services on a railroad engine which was far removed from and not an integral part of the loading and unloading process. In fact, the evidence of record herein clearly suggests that this traditional railroad job was assigned to Plaintiff at a time and place in which the loading and unloading process could not be affected. Certainly, the case at bar is not a case where the LHWCA should be held to apply. This Court has the unique opportunity to provide direction to and chart a clear path for injured railroad workers by defining the application of the LHWCA vis a vis the FELA. Thousands of federally protected railroad employees will be affected by the Court's attention to this issue.

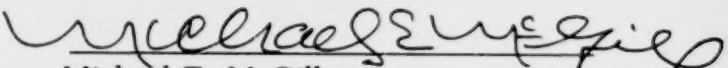
Accordingly, petitioner respectfully prays that the Court grant this Petition for Certiorari.

CONCLUSION

For the reasons stated above, the decision of the court of Appeals in the instant case raises a question of general importance in the administration of both the Federal Employers Liability Act and the Longshore and Harbor Worker's Compensation Act. It is critical that this Court further define the parameters of LHWCA coverage so that interstate railroad employees who receive on-the-job injuries may recover damages for those injuries under the FELA, as intended by the Congress of the United States.

WHEREFORE, petitioner respectfully prays that the petition for certiorari be granted.

Respectfully Submitted,



Michael E. McGill
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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case NO. 3:89CV7318

PAUL E. ARNOLD,

Plaintiff(s),

vs.

CONSOLIDATED RAIL CORP.,

Defendant(s).

OPINION AND ORDER
(Filed September 7, 1990)

WALINSKI, J.

This cause is before the Court on Defendant's motion to dismiss, plaintiff's opposition thereto and defendant's reply. This Court has jurisdiction pursuant to the Federal Employers Liability Act, 45 U.S.C. § 51 *et seq.* (FELA).

Background

In deciding a motion to dismiss under Rule 12(b) Fed. R. Civ. P., the function of the Court is to test the legal sufficiency of the complaint. In scrutinizing the complaint, the Court is required to accept the allegations stated in the complaint as true, *Hishon* v. *King & Spalding*, 467 U.S. 69 (1975), while viewing the complaint in a light most favorable to the plaintiffs. *Schuer* v. *Rhodes*, 416 U.S. 232 (1974); *Westlake* v. *Lucas*, 537 F.2d 857, 858 (6th Cir. 1976). The Court is without authority to dismiss the claims unless it can be

demonstrated beyond a doubt that the plaintiff can prove no set of facts that would entitle it to relief. *Conley* v. *Gibson*, 355 U.S. 41 (1957); *Westlake*, *supra*, at 859. *See generally* 2A J. Moore, W. Taggert & J. Wicker, *Federal Practice*, ¶ 12.08 (2d ed. 1985).

Plaintiff, Paul E. Arnold (Arnold), was a mechanic employed by defendant Consolidated Rail Corp. (Conrail) at the Presque Isle/Lakefront Docks facility (the dock facility) in 1988. He allegedly injured his back trying to release a brake shoe from the brake assembly of a locomotive. The locomotive, No. 7800, was owned by Toledo Ore Railroad Company (TORCO), a wholly owned subsidiary of CSX Transportation Inc. (CSX). Locomotive No. 7800 was used to move rail cars into and out of the "loadout" station located within the dock facility. Arnold's alleged injury occurred on a section of track located approximately 2,000 yards away from the waterfront but within the dock facility.

Conrail moves the Court to dismiss this action for lack of subject matter jurisdiction, claiming that because Arnold was a maritime employee, his exclusive remedy lies under the Longshore and Harbor Workers Compensation Act, 33 U.S.C. 901 *et seq.* (LHWCA). Arnold argues that he was not a maritime employee, as that term is defined by the LHWCA, and that this Court has jurisdiction to hear his FELA claims.

Discussion

If Arnold is covered by the LHWCA, that is his sole and exclusive remedy and his FELA claims are preempted and must be dismissed. 33 U.S.C. 905(a); *Kelly* v. *Pittsburgh & Conneaut Dock Co.*, 900 F.2d 89 (6th Cir. 1990). The Supreme Court, in *Chesapeake and Ohio Ry. Co.* v. *Schwalb*, ____ U.S. ____, 110 S. Ct. 381 (1989), identified four elements that must be met for LHWCA coverage to apply:

> the injured person must be injured in the course of his employment, 33 U.S.C. § 902(2); his employer must

> have employees who are employed in maritime employment, § 902(4); the injury must occur "upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)," 903; and the employee who is injured within that area must be a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker . . . 902(3).

Id. at 384. These last two elements are known as the "situs" and "status" requirements, respectively. They should be interpreted broadly with a view towards extended coverage of the LHWCA. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977).

In the case *sub judice*, the first two elements are undisputed: Arnold was allegedly injured in the course of his employment attempting to repair Locomotive No. 7800 and Conrail has employees employed in maritime employment, pursuant to the Toledo Docks Operating Agreement. However, the parties disagree as to the situs and status requirements.

The situs requirement is a functional one: is the situs used as part of the loading or unloading operations? *Merrill* v. *Chicago & Illinois Midland Ry.*, ____ F. Supp. ____, WL 118064 (C.D. Ill. 1990). Arnold argues that because his injury occurred on a section of track located approximately 2,000 yards from the waterfront, the situs requirement is not met. However, distance from the water itself is not determinative of coverage. *I.T.O. Corp.* v. *Benefits Review Board*, 529 F.2d 1080, 1082-84 (4th Cir. 1975), *vacated on other grounds*, 433 U.S. 904, *on remand*, 563 F.2d 646 (1977) (workers injured in marshaling area ____ feet to three quarters of a mile from the water met the situs requirement);

Conligio v. *Norfolk and Western Ry.*, 670 F. Supp. 1353, 1354-55 (E.D. Mich. 1987) (railway's "eastbound yard" satisifed the situs requirement). Arnold's injury occurred on tracks used to move coal cars around inside the dock facility. It is clear that they were part of a marine railway, which by express definition is considered to be a part of the navigable waters of the United States. 33 U.S.C. 903(a). Given the *Caputo* mandate that coverage be interpreted broadly, this Court finds that Arnold satisifes the situs requirement.

The status requirement is an occupational one: was the employee involved in an occupation essential or integral to the loading or unloading process? *Chesapeake and Ohio Ry. Co.* v. *Schwalb*, ____ U.S. ____, 110 S. Ct. 381, 385 (1989). In *Schwalb*, the Supreme Court held that two maintenance workers were covered under the LHWCA for injuries incurred while cleaning conveyor belts used to load coal onto ships. This maintenance was essential to the loading process because if it was not performed, the loading process would eventually be shut down. *Id.* at 386.

Schwalb was recently interpreted in *Atlantic Container Service, Inc.* v. *Coleman*, 904 F.2d 611 (11th Cir. 1990). In that case, Coleman, a mechanic, was injured while making repairs to outbound chassis. These chassis were used to carry containers unloaded from ships to various points inland. The court, in finding coverage under the LHWCA, held that "[w]ithout the essential maintenance necessary to make the outbound rigs roadworthy, the unloading process would stop indefinitely." *Id.* at 618.

In the case *sub judice*, Arnold contends that he was merely performing traditional railroad work. This makes no difference. *Schwalb* at 386. Locomotive No. 7800 and the others like it operated by TORCO are needed to move the cars into and out of the "load out station". Without his repairs, especially if the brake problem was a "federal defect" that would put No. 7800 out of service until fixed, the loading and unloading process at the dock facility would eventually come to a halt. Thus, Arnold's repairs were essential to the loading process and the status requirement is met.

Arnold meets all four elements of the *Schwalb* test for LHWCA coverage. Accordingly, it is

ORDERED that defendant's motion to dismiss be granted and that this case be dismissed for lack of subject matter jurisdiction.

/s/ NICHOLAS J. WALINSKI
SENIOR U.S. DISTRICT JUDGE

TOLEDO, OHIO
September 7, 1990

APPENDIX B

NOT FOR PUBLICATION

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION
Sixth Circuit Rule 24 limits citation to specific situations. Please see Rule 24 before citing in a proceeding in a court in the Sixth Circuit. If cited, a copy must be served on other parties and the Court.
This notice is to be *prominently* displayed if this decision si reproduced.

90-3835

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PAUL E. ARNOLD,
Plaintiff-Appellant,

v.

CONSOLIDATED RAIL CORP.,
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO.

(Filed June 6, 1991)

BEFORE: KEITH and MILBURN, Circuit Judges; and COHN, District Judge.*

PER CURIAM: Paul E. Arnold ("plaintiff") appeals from the district court's September 7, 1990, order granting defen-

* The Honorable Avern Cohn, United States District Judge for the Eastern District of Michigan, sitting by designation.

dant Consolidated Rail Corporation's motion to dismiss for lack of subject matter jurisdiction.

Having carefully considered the record and the arguments presented in the briefs and orally, we find no error warranting reversal. We, therefore, AFFIRM the order of the Honorable Nicholas J. Walinski, Senior United States District Judge for the Northern District of Ohio, for the reasons set forth in his September 7, 1990, Opinion and Order. We note that even if the railroad tracks on which plaintiff worked were not a "marine railway," the finding that they were inside the dock facility area which adjoins navigable waters was sufficient to meet the situs requirement.

ISSUED AS MANDATE: June 28, 1991
COSTS: None

[DULY CERTIFIED]

Supreme Court, U.S.
FILED
OCT 1 1991
OFFICE OF THE CLERK

(2)

Case No. 91-364

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL E. ARNOLD,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the United States District Court and the Sixth Circuit Court of Appeals properly found that petitioner fell within the "situs" requirement of the Longshore and Harbor Workers' Compensation Act, 33 *U.S.C.* 901 *et seq.*, where the petitioner's injuries occurred approximately 2,000 yards from the waterfront but in an area customarily used by the employer in loading and unloading a vessel.

2. Whether the United States District Court and the Sixth Circuit Court of Appeals properly found that petitioner satisfied the "status" requirement of the Longshore and Harbor Workers' Compensation Act, 33 *U.S.C.* 901 *et seq.*, in that petitioners' activities on April 21, 1988 consisted of repairing equipment essential to the loading and unloading process at the Presque Isle/Lakefront Dock facility.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-364

PAUL E. ARNOLD,

Petitioner,

v.

CONSOLIDATED RAIL CORPORATION,

Respondent.

BRIEF OPPOSING PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

STATEMENT OF THE CASE

In 1988, petitioner Paul E. Arnold, was employed by respondent Consolidated Rail Corporation (Conrail) as a mechanic. During the year, petitioner was assigned to the Presque Isle/Lakefront Docks facility located in Toledo, Lucas County, Ohio pursuant to the Toledo Docks Operating Agreement (TDOA). The TDOA is an agreement between various railroad companies, including Conrail, and the Lakefront Dock Company regarding the operation and maintenance of the rail and dock facilities contained within Presque Isle/Lakefront Docks. The TDOA provides that the Presque Isle/Lakefront Docks facility would be managed as a combined coal and ore facility under the direction of the Chesapeake and Ohio Railroad Company. The Presque Isle/

Lakefront Docks facility handles coal from rail cars into Great Lakes' vessels and unloads ore from vessels into rail cars for shipment to steel mills.

On April 21, 1988, petitioner inspected Locomotive No. 7800 at the direction of supervisory personnel stationed at Presque Isle. Locomotive No. 7800 was owned by the Toledo Ore Railroad Company (TORCO) which is a wholly-owned subsidiary of CSX Transportation. TORCO Locomotive No. 7800 is operated exclusively within the Presque Isle/Lakefront Docks facility and is used to move rail cars into and out of the "load-out" station at Presque Isle.

While engaged in repair work on the locomotive, appellant was injured while trying to release a stubborn brake shoe from the brake assembly. At the time of petitioner's injuries, the brake shoe of TORCO Locomotive No. 7800 was so in need in repair as to constitute a "federal defect" under the Federal Railway Administration. Thus, as Locomotive No. 7800 contained a federal defect, the locomotive could not legally be used until the defect was corrected. Appellant was not on the waterfront when injured, but instead, was located approximately 2,000 yards from the waterfront on a section of TORCO railroad track within the Presque Isle/Lakefront Docks facility.

Petitioner brought an action against Conrail pursuant to the Federal Employers' Liability Act (FELA) 45 *U.S.C* § 51 *et seq*. Conrail filed a motion to dismiss petitioner's FELA action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. Conrail asserted that petitioner's injuries were within the exclusive jurisdiction of the Longshore and Harbor Workers' Compensation Act (LHWCA), 33 *U.S.C.* § 901 *et seq*. and, as the LHWCA constituted petitioner's sole remedy for his injuries of April 21, 1988, the District Court had no subject matter jurisdiction to hear petitioner's FELA claim. The District Court found that petitioner satisfied the requisite situs and status tests for LHWCA coverage, found that LHWCA provided petitioner's exclusive remedy for his work-

related injuries, and dismissed his FELA action. The District Court's decision was affirmed by the Sixth Circuit Court of Appeals.

Petitioner insists that the LHWCA is not applicable to the injuries he sustained on April 21, 1988, and that his FELA complaint should not have been dismissed. It is petitioner's position that neither the situs nor status tests required for coverage under the LHWCA were satisfied. Petitioner argues that his injuries occurred outside of the parameters of the situs test, set forth in 33 *U.S.C.* § 903(a), in that petitioner alleges that his injury did not occur in an area which is part of the loading and unloading operations of the Presque Isle/Lakefront Docks facility. Petitioner also alleges that the status requirement was not satisfied in that petitioner's activities on the date in question were not an essential part of the loading or unloading process at the Presque Isle/Lakefront Docks facility. Petitioner insists that this Court has the "unique opportunity to provide direction to and chart a clear path for injured railroad workers by defining the application of the LHWCA vis a vis the FELA." *Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit*, p. 15.

As will be established below, the District Court properly found that petitioner fell within the expansive coverage of the LHWCA and properly dismissed his FELA claim. The District Court followed this Court's most recent decision regarding the LHWCA and FELA, in *Chesapeake and Ohio Railway Co.* v. *Schwalb*, 493 U.S. 40 (1989), when it found that the situs and status tests were satisfied, and accordingly, that the LHWCA provided petitioner's exclusive remedy for the injuries sustained on April 21, 1988. The District Court properly found that the situs at issue, a section of TORCO railroad track, was an adjoining area customarily used in loading or unloading a vessel. The District Court was also correct in its finding that petitioner's activities on the date in question, repair and maintenance of a TORCO locomotive,

were essential to the loading and unloading process at the Presque Isle/Lakefront Docks facility, as required in *Schwalb*, *supra*, and that petitioner's repair and maintenance work met the status test for LHWCA coverage.

Petitioner has failed to set forth "special and important reasons," required by Rule 10 of the Rules of the United States Supreme Court, why this Court should review the dismissal of petitioner's FELA complaint. This case presents no substantial constitutional question nor does this case present a special or important principle or rule of law so as to justify review by this court. The District Court's decision, with its subsequent affirmance by the Sixth Circuit Court of Appeals, is not in conflict with a decision of any other United States Court of Appeals on this matter. The District Court's Decision is consistent with federal precedent, in particular, *Schwalb*, *supra*, and thus, the Courts below have not departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. Accordingly, pursuant to Supreme Court Rule 10, a petition for writ of certiorari to the United States Court of Appeals for the Sixth Circuit is not well-taken and for the reasons which follow, should be denied.

ARGUMENT

A. Situs requirement of the LHWCA.

The parties agree that, if the LHWCA applies, it provides the exclusive remedy for the injuries petitioner sustained on April 21, 1988 and the District Court properly dismissed the FELA complaint. *See, Kelley* v. *Pittsburgh Conneaut Dock*, 900 F.2d 89 (6th Cir. 1990). The parties also agree that, for the LHWCA to apply, the situs and status tests must be satisfied. *Chesapeake and Ohio Railway Co.* v. *Schwalb*, 493 U.S. 40 (1989). For the situs test to be satisfied, the injury must have occurred:

> "Upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, dismantling, or building a vessel)."

33 U.S.C. § 903(a); *Schwalb*, 493 U.S. at 46. The situs and status requirements should be interpreted broadly with a view towards extended coverage of the LHWCA. *Northeast Marine Terminal Co.* v. *Caputo*, 432 U.S. 249, 268 (1977).

As noted by the District Court, the situs requirement is a functional one; is the situs used as a part of the loading and unloading operations? *Merrill* v. *Chicago and Illinois Midland Railway Co.*, 751 F.Supp. 770 (C.D. Ill. 1990).

In this case, the situs in question is a section of TORCO railroad track which contained TORCO Locomotive No. 7800. As noted earlier, TORCO Locomotive No. 7800 is operated exclusively within the Presque Isle/Lakefront Docks facility and is used to move rail cars to be loaded with coal or ore at the "load-out" station.

There is indeed ample precedent for the determination that the section of TORCO railroad track is part of loading and unloading operations of the Presque Isle/Lakefront Docks facility. *Voglesang* v. *Western Maryland Railway Co.*, 670 F.2d 1347 (4th Cir. 1982) (LHWCA covered employee in-

jured while atop railroad car located on defendant's railroad tracks); *Cargill Inc.* v. *Powell*, 573 F.2d 561, 561-63 (9th Cir. 1977) (status requirement satisfied where grain facility worker injured while operating a "tipper" which was used to unload railroad cars). *Merrill*, 751 F.Supp. at 775 (railroad worker within LHWCA coverage where he was injured on railroad tracks leading away from the dump house; *Conligio* v. *Norfolk and Western Railway Co.*, 670 F.Supp. 1353 (E.D. Mich. 1987) (defendant's east-bound railroad yard, which contained rail cars destined for shipment to Canada, satisfied the expansive view of LHWCA coverage under the status test).

Petitioner argues, that since his injuries occurred approximately 2,000 yards from the waterfront, his injuries are not within the geographical parameters set forth in 33 U.S.C. § 903(a). This argument is without merit. It is well-established that distance from the water itself is not determinative of LHWCA coverage. *Brady-Hamilton Stevedore Co.* v. *Herron*, 568 F.2d 136 (9th Cir. 1978) (employee injured at a gear locker located approximately 2,600 feet from the waters' edge within LHWCA coverage). *Dravo Corp.* v. *Maxin*, 545 F.2d 374 (3d Cir. 1976) (shipbuilder's structural shop located some 2,000 feet from navigable channel is within LHWCA coverage). In the present case, the fact that petitioner's injuries occurred approximately 2,000 yards from the waterfront does not remove said injuries from LHWCA coverage.

Petitioner also contends that the District Court erred when it stated that petitioner's injury occurred on a "marine railway" and thus, satisfied the situs requirement. This error is of no consequence. The parties agree that petitioner's injuries did not occur on a marine railway. Instead, respondent submits that petitioner injuries occurred within an "adjoining area customarily used . . . in loading . . . (or) unloading . . . a vessel." 33 *U.S.C.* § 903(a). An injury sustained in this area is within LHWCA coverage and the Sixth Circuit Court of Appeals noted that, "even if the railroad tracks on which

plaintiff (petitioner) worked were not a 'marine railway,' the finding that they were inside the dock facility area which adjoins navigable waters was sufficient to meet the situs requirement." *Arnold* v. *Consolidated Rail Corp.*, No. 90-3835 slip op. (6th Cir. June 6, 1991) (per curium). The parties do not dispute that petitioner was injured on a section of TORCO railroad track contained within the Presque Isle/Lakefront Docks facility. In light of *Vogelsang, supra*, *Merrill, supra*, and *Conligio, supra*, and the liberal construction of the situs requirement of the LHWCA, the District Court properly found that the section of railroad track at issue was used in loading/unloading operations at the Presque Isle/Lakefront Docks facility and thus, met the situs requirement for LHWCA coverage.

B. Status requirement for LHWCA coverage.

The status requirement for LHWCA coverage is set forth in 33 *U.S.C.* § 902(3). Section 902(3) states:

> "The term 'employee' means any person engaged in maritime employment, including any longshoreman or any other person engaged in longshoring operations, and any harbor worker including the ship repairman, ship builders, and ship breaker . . ."

In analyzing whether an employee falls within § 902(3), the United States Supreme Court has employed the "essential to the loading or unloading process" test. *Schwalb*, 493 U.S. at 47. Thus, petitioner's activities on April 21, 1988 (repairing or maintaining a TORCO locomotive) are within LHWCA coverage if they are found to be essential to the loading and unloading process of the Presque Isle/Lakefront Docks facility. *Id.*

In *Schwalb*, the Supreme Court found that employees who repair or maintain equipment essential to the loading and unloading process are covered by the LHWCA. *Id.* The Supreme Court held that it makes no difference that the par-

ticular kind of repair work being performed might be considered traditional railroad work or might be done by railroad employees wherever railroad cars are unloaded. *Id.* The court also held that routine maintenance work was also within LHWCA coverage. The Court stated "someone who repairs or maintains a piece of loading equipment is just as vital to and an integral part of the loading process as the operator of the equipment." *Id.*

Petitioner argues that he was performing traditional railroad work at the time of his injuries and pursuant to union contract, only a railroad employee could have performed the repair work at issue. This argument is without merit. It is well-established that railroad workers working dock-side, performing traditional railroad work, may be covered by the LHWCA. *Schwalb*, 493 U.S. at 46-47. *Harmon* v. *Baltimore and Ohio Railroad Co.*, 741 F.2d 1398 (D.C. Cir. 1984) (railroad employee injured while repairing a coal hopper covered by LHWCA); *Price* v. *Norfolk and Western Railway Co.*, 618 F.2d 1059 (4th Cir. 1980) (railroad employee injured while painting structure found within LHWCA coverage); *Conligio*, 670 F.Supp. at 1355 (railroad engineer's task of "making up trains" constituted maritime employment within LHWCA coverage).

Petitioner also argues that, because the loading and unloading process was not halted at the precise moment of appellant's injuries, then the repair and/or maintenance work performed on TORCO Locomotive No. 7800 was not then essential to the loading or unloading process of the Presque Isle/Lakefront Docks facility. This argument is also without merit. It is well-established that, to satisfy the essential to the loading and unloading test, respondent need only to show that, without the particular work, the loading and/or unloading process would at some future time, cease. *Schwalb*, 493 U.S. at 50; *Graziano* v. *General Dynamic Corp.*, 663 F.2d 340 (1st Cir. 1981) (even though shipbuilding process of company would not have come to an immediate halt if employee's duties were not specifically

discharged, failure to perform routine maintenance would have lead to stoppage or curtailment of shipbuilding; thus, employee's duties mandated his coverage under LHWCA); *Price* v. *Norfolk and Western Railway Co.*, 618 F.2d 1059 (4th Cir. 1980) (railroad employee injured while painting structure which was essential to the loading and unloading of maritime cargo was covered by LHWCA; even though the loading process would not stop immediately if the structure was not painted, the failure to paint would eventually lead to severe rusting that would halt the entire process). Thus, the District Court properly made the common sense determination that, without repair or maintenance work on TORCO locomotives, eventually the loading and unloading process, which is brought about by TORCO locomotives on TORCO railroad track within the Presque Isle/Lakefront Docks facility, would cease.

Other courts have construed the Supreme Court's decision in *Schwalb* consistent with the Court below. *Atlantic Container Service, Inc.* v. *Coleman*, 904 F.2d 611 (11th Cir. 1990) (land-based work of a mechanic, which consisted almost entirely of making out-bound loaded chassis "roadworthy," was an essential part of the loading or unloading process); *Triguero* v. *Consolidated Rail Corp.*, 932 F.2d 95 (2d Cir. 1991) (driver of "yard hustler" used to transport cargo containers between stevedoring business' dockside storage facility and carrier's port district rail facility satisfied status test). Accordingly, the District Court's finding that petitioner who was injured while repairing a locomotive used exclusively for the transportation of rail cars to the load out station of the Presque Isle/Lakefront Docks facility satisfied the status test for LHWCA coverage was proper, considering *Schwalb* and other federal precedent.

C. Considerations governing review on writ of certiorari.

As provided in Rule 10 of the Rules of the Supreme Court of the United States, a review on writ of certiorari is not a

matter of right, but instead, of judicial discretion. In addition, the Court will hear a case upon a writ of certiorari only when the petitioner sets forth "special and important reasons therefore." In the present case, petitioner has not shown such special and important reasons for a review of this case by the United States Supreme Court, and accordingly, the petition for writ of certiorari must be denied.

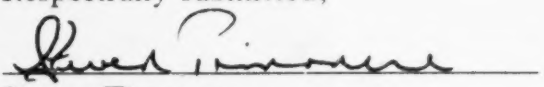
The Sixth Circuit Court of Appeal's decision affirming the District Court's decision which found that petitioner was within the LHWCA coverage on April 21, 1988, is not in conflict with any reported decision of another United States Court of Appeals on this issue. Nor is the Sixth Circuit's decision in conflict with any state court decision regarding railroad workers and the LHWCA. In addition, the Sixth Circuit's decision has not departed from the accepted and usual course of judicial proceedings so as to call for an exercise of this Court's power of supervision. Instead, the Sixth Circuit's decision is consistent with the well-established precedent of the LHWCA including *Schwalb*, *supra*. This case presents no substantial constitutional question, no principle, no rule of law which has not been many times reviewed and adjudicated by this Court. Nor does this case represent any matter of great interest or concern except to the petitioner, who is dissatisfied with the decisions rendered below. On that basis, petitioner has not demonstrated that "special and important reasons" are present which require this Court to exercise its discretion and accept this case for review.

CONCLUSION

The decision of the District Court which found that petitioner was within the LHWCA and that decision's affirmance by the Sixth Circuit Court of Appeals is consistent with this Court's decision in *Schwalb* and with other fereral courts which have interpreted the LHWCA. Petitioner satisfied the situs and status tests required for LHWCA coverage, the LHWCA provided petitioner's exclusive remedy for the injuries he sustained on April 21, 1988, and the District Court properly dismissed petitioner's FELA claim.

In addition, petitioner has not shown that special and important reasons exist for this Court to exercise its discretion and review the District Court's decision to dismiss petitioner's FELA claim. Petitioner has shown no conflict between the decisions below and other federal or state court decisions regarding LHWCA coverage. Nor has petitioner shown that the opinions below have departed from prior LHWCA precedent. For those reasons, respondent respectfully requests that the Court deny the petition for writ of certiorari to the Sixth Circuit Court of Appeals.

Respectfully submitted,



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APPENDIX

RULE OF THE SUPREME COURT

PART III. JURISDICTION ON WRIT OF CERTIORARI

Rule 10

CONSIDERATIONS GOVERNING REVIEW ON WRIT OF CERTIORARI

.1. A review on writ of certiorari is not a matter of right but of judical discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(a) When a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals.

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect to a petition for a writ of certiorari to review a judgment of the United States Court of Military Appeals.